



California Fair Political Practices Commission

March 6, 1987

Louis T. Lozano
Breon, Galgani, Godino & O'Donnell
2444 Main Street, Suite 135
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-87-034

Dear Mr. Lozano:

You have requested advice on behalf of Todd Jezek and John Kaufman, members of the Board of Trustees of the Atwater Elementary School District, concerning their duties under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} This letter confirms the telephone advice we provided to Mary Beth de Goede of your office on February 2, 1987.

QUESTION

May Mr. Jezek and Mr. Kaufman participate in decisions to levy developer fees for the construction of school facilities? (The proposed fees would be approximately \$0.75 per square foot of residential construction.)

CONCLUSION

Generally, under the facts provided, Mr. Jezek may participate in the decisions. He will be required to disqualify himself in the future if (1) he receives or is promised \$250 or more in income from a developer who would be subject to the fees, and who would be foreseeably and materially affected by the decision, or (2) facts develop which indicate that the commission income received by Brodalski Realty would be foreseeably and materially affected by the decision.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

Mr. Kaufman must disqualify himself from participating in the developer fee decisions if those decisions would foreseeably and materially affect (1) any developer who is a source of \$250 or more in income to him, or (2) the commission income received by the Coldwell Banker franchise.

FACTS

Mr. Jezek and Mr. Kaufman are both real estate agents. Mr. Jezek is a part-time real estate agent for Brodalski Realty. He sold a total of 4 homes in 1986, none of which was sold on behalf of a developer. Brodalski Realty has a contract with a developer to sell approximately 100 homes in a new residential tract. In the future, it is possible that Mr. Jezek will sell one or more homes in this tract. Under the contract between Brodalski Realty and the developer, the developer pays a flat fee of \$1,200 per home sold. The real estate agent involved in the sale receives 50 percent of this fee and Brodalski Realty retains 50 percent.

Mr. Kaufman is a real estate agent and a partner in a franchise office of Coldwell Banker. He owns a greater than 10-percent interest in the franchise. Mr. Kaufman sold 33 homes in 1986, 40 percent of which were new homes. The Coldwell Banker franchise has several contracts with developers to sell new homes.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on, among other things, any source which has provided or promised the official \$250 or more in income during the 12 months preceding the decision. (Section 87103(c).)

Mr. Jezek and Mr. Kaufman both receive commission income for their services as real estate agents. Regulation 18704.3(c)(3) (copy enclosed) states that the following are sources of commission income for a public official who is a real estate agent:

- (A) The broker and brokerage business entity under whose auspices the agent works;

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(B) The person the agent represents in the transaction; and

(C) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

Regulation 18704.3(c)(3)(A)-(C).

The full gross value of the commission income for a specific sale is attributed to each source of commission income. (Regulation 18704.3(d).) Accordingly, if the real estate agent receives commission income totaling \$250 or more from a sale, the real estate agent may be disqualified from participating in decisions affecting any of the sources of commission income.

Mr. Jezek

Brodalski Realty has provided commission income totaling \$250 or more to Mr. Jezek during the past 12 months. You have informed us that Mr. Jezek has not been involved in any sales where a developer would be considered a source of commission income during the preceding 12 months. Therefore, we must determine whether the developer fee decisions would foreseeably and materially affect Brodalski Realty. Of course, if Mr. Jezek were to receive or be promised \$250 or more in commission income from a developer in the future, he must at that point begin to disqualify himself from participating in decisions which would foreseeably and materially affect the developer. For example, if Mr. Jezek sells one of the new homes in the tract covered by the contract between Brodalski Realty and the developer, and he will receive \$250 or more in commission income from that sale, Mr. Jezek must consider the effect of the developer fee decisions on that developer.

The effect of a decision is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. Certainty is not required; however, if the effect is but a mere possibility, it is not considered reasonably foreseeable. (Thorner Opinion, 1 FPCC Ops. 198 (No. 75-089, Dec. 4, 1975), copy enclosed.)

Brodalski Realty currently has one contract with a developer for the sale of new homes, and receives a flat commission of \$1,200 per home sold. In this situation, the developer fee decisions would not change the amount of commission income Brodalski Realty receives per house sold.

The developer fee decisions might affect the total number of new houses sold, thereby affecting the total amount of commission income to Brodalski Realty. However, without specific facts to that effect, we conclude that it is not reasonably foreseeable that Brodalski Realty will be materially affected by the developer fee decision. Therefore, we conclude that Mr. Jezek may participate in the developer fee decisions.

Mr. Kaufman

You have informed us that Mr. Kaufman received \$250 or more in commission income from Coldwell Banker. In addition, Mr. Kaufman has acted as the real estate agent in sales for developers. Therefore, developers are sources of \$250 or more of the commission income he has received in the past year. Finally, because Mr. Kaufman is the owner of more than a 10-percent interest in the Coldwell Banker franchise, sources of income to the franchise are considered sources of income to Mr. Kaufman, based on his pro-rata share. Accordingly, any commission income the franchise receives from a developer, and does not pay to its real estate agents, is considered income to Mr. Kaufman, based on his pro-rata ownership interest in the franchise. (See Carey Opinion 3 FPPC Ops. 99 (No. 76-087, Nov. 3, 1977), copy enclosed.) Therefore, Mr. Kaufman must disqualify himself from participating in any decisions which would foreseeably and materially affect the Coldwell Banker franchise or the developers who have provided or promised him \$250 or more in income during the preceding 12 months.

In Mr. Kaufman's situation, we will focus on the commission income he has received from developers. In analyzing Mr. Jezek's situation, we outlined the analysis to be used in determining whether the developer fee decisions would foreseeably affect a realty office.

For Mr. Kaufman, the question is whether the developer fee decisions will materially affect any developer who is a source of his commission income. Regulation 18702.2 (copy enclosed) contains monetary guidelines for determining whether the foreseeable effects of a decision on a business entity which provides income to an official are considered material. These guidelines differ with the financial size of the business in question. You should carefully examine Regulation 18702.2 to determine which guidelines apply in Mr. Kaufman's situation. For example, if any of the development companies in question is not a publicly traded entity, and is of a relatively small financial size, the guidelines in Regulation 18702.2(g) will apply. Pursuant to Regulation 18702.2(g), the effect of a decision will be considered material if:

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(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

Regulation 18702.2(g)(1)-(3).

The developer fee decisions will affect developers' expenses. Using the guidelines in Regulation 18702.2(g) as an example, if a small developer who is a source of income to Mr. Kaufman would incur \$2,500 or more in additional expenses in a fiscal year, Mr. Kaufman must disqualify himself from participating in the developer fee decisions. In this example, if the proposed fee of \$0.75 per square foot of residential development is imposed, a developer who builds 3,334 or more square feet of residential development would incur at least \$2,500 in additional expenses. You have informed us that the average size of a new house in the district is 1,570 square feet. Thus, a residential tract of three or more average-sized homes would result in at least \$2,500 in additional expenses for the developer. Different standards in Regulation 18702.2 would apply if the developer were a large or publicly traded business entity.

Based on the example discussed above, in the telephone conversation with Mary Beth de Goede of your office, we concluded that Mr. Kaufman must disqualify himself from participating in the developer fee decisions.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan
By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosures

BREON, GALGANI, GODINO & O'DONNELL

A PROFESSIONAL CORPORATION

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January 27, 1987

EXPRESS MAIL

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REPLY TO: FRESNO

Fair Political Practices Commission
428 "J" Street, Suite 800
Sacramento, California 95814

Re: Request for Formal Written Advice

Dear Sir or Madam:

The purpose of this letter is to request formal written advice pursuant to Government Code section 83114(b) and Title II, California Administrative Code section 18329. This request is made on behalf of

Todd Jezek
Member of the Board of Trustees
Atwater Elementary School District
P. O. Box 775
Atwater, California 95301

John Kaufman
Member of the Board of Trustees
Atwater Elementary School District
P. O. Box 775
Atwater, California 95301

The above-mentioned Board members have authorized me as the attorney for the Atwater Elementary School District ("District") to prepare this request. Moreover, I have been directed to request an expedited response as the matter which occasions this inquiry is set for action by the Board of Trustees on February 3, 1987.

QUESTION PRESENTED

May two school district governing board members who are also real estate agents vote on or participate in the decision to levy developer fees?

FACTS

Government Code section 53080, which recently became effective on January 1, 1987, authorizes the governing board of any school district to levy developer fees for the purpose of constructing or reconstructing school facilities. Government Code 65995 (b) limits the maximum amount of such school fees to \$1.50 per square foot of residential construction and \$0.25 per square foot of new commercial or industrial construction.

In determining whether to adopt such fees and the amount of such fees, the Atwater Elementary School District is following the procedures specified in Government Code section 65962 and 54992. Accordingly, the District is conducting noticed public hearings to receive evidence regarding the fee and particularly, the relationship between the fee and the costs of providing the school facilities. It is anticipated that the Governing Board will not levy the maximum residential fee, but will instead set its fee amount at approximately \$0.75 per square foot of residential construction. In addition, District will probably not take any action to levy fees on commercial and industrial construction at this time.

Mr. Jezek and Mr. Kaufman wish to determine whether they can participate in the decision to levy developer fees. Both of these individuals are real estate agents and are employed by companies that do business with developers.

Mr. Jezek acts as a part-time real estate agent for Brodalski Realty and is compensated on a salary and commission basis. He earned in excess of \$250.00 from Brodalski in the preceding 12 months. Mr. Jezek does not have any ownership interest or a direct or indirect investment in Brodalski of \$1,000 or more. Finally, Mr. Jezek sold a total of four houses during the 1986 calendar year.

Mr. Kaufman acts as a real estate agent for a franchise office of Coldwell Banker and is paid on a salary and commission basis. Mr. Kaufman earned in excess of \$250.00 during the last 12 months from Coldwell Banker. Specifically, Mr. Kaufman sold 33 houses during the 1986 calendar year. In addition, Mr. Kaufman is

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a partner in the Coldwell Banker franchise located in Atwater, California. Mr. Kaufman's ownership interest in the franchise by virtue of the partnership exceeds 10% of the overall business. During 1986, a total of 335 homes were sold by the Atwater franchise office.

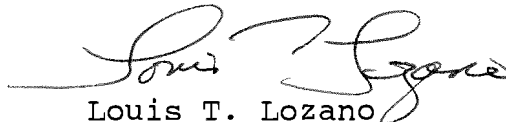
Neither of these Board members receive money directly from developers. However, both of their companies contract with developers for the purpose of marketing houses. Brodalski and Coldwell Banker receive sales commissions based upon their contracts with developers and varying amounts of these commissions are passed on to Mr. Jezek and Mr. Kaufman. Finally, both Brodalski and Coldwell Banker sell land to developers through their real estate agents such as Jezek and Kaufman.

As previously mentioned, the District is contemplating a levy of developer fees somewhere in the neighborhood of \$0.75 per square foot of residential construction. Consequently, on an average size home of 1570 square feet, the fee would be approximately \$1,177.50. Assuming this fee is added to the purchase price of the home, the typical 6% commission paid upon sale of the home will be increased by only \$71. On the other hand, imposing developer fees on residential construction, which in turn raises housing prices, may make homes less marketable, thereby inhibiting sales and reducing the number of commissions. In either situation, however, the effect of the decision to levy developer fees on the financial interests of these two Board members seems both remote and negligible at best.

I hope this information is sufficient. If you need any further information please do not hesitate to contact me immediately.

Very truly yours,

BREON, GALGANI, GODINO & O'DONNELL



Louis T. Lozano

LTL:dge

cc: Dr. Frank English



California Fair Political Practices Commission

January 29, 1987

Louis T. Lozano
Breon, Galgani, Godino
& O'Donnell
2444 Main Street, Suite 135
Fresno, CA 93721

Re: 87-034

Dear Mr. Lozano:

Your letter requesting advice under the Political Reform Act was received on January 28, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn E. Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script, reading "Diane M. Griffiths", is written over the typed name.

Diane M. Griffiths
General Counsel

DMG:plh
cc: Todd Jezek
John Kaufman